OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

June 5, 2001

Mr. Thomas F. Keever
Assistant District Attorney
County of Denton
P.O. Box 2850
Denton, Texas 76202

OR2000-2326

Dear Mr. Keever:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147480.

Denton County (the "county") received a request for: (1) the personnel file of a former county employee and contractor, (2) documents regarding a State Infrastructure Bank loan, and (3) documents relating to a 1996 meeting between a former county employee and a developer. You state that the county will release information responsive to items 1 and 2 to the requestor. However, you contend that some of the requested information may consist of deleted e-mails that, for the purposes of the Public Information Act (the "Act"), do not exist and therefore are not subject to disclosure under the Act. Furthermore, you claim that information responsive to item 3 is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered your arguments and have reviewed the submitted information.

We first address your contention that potentially responsive e-mails that have been deleted are not subject to the Act and the county is not required to search its computers for such deleted e-mails. The Act applies only to "public information" in existence at the time of the request for information. *See* Gov't Code § 552.021; *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). "Public information" is defined under section 552.002 of the Act as:

> information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
>
> (1) by a governmental body; or

> (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Public information may be recorded on various media, including "a magnetic, optical, or solid state device that can store an electronic signal." *Id.* § 552.002(b). Furthermore, "[t]he general forms in which media containing public information exist include ... a voice, data, or video representation held in computer memory.", *Id.* § 552.002(c).

Computer software programs keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of the location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed. You do not indicate whether the potentially responsive deleted e-mails have been simply placed into the trash bin on a computer desktop or have been deleted from the trash bin. To the extent an e-mail has only been placed in the "trash bin" or "recycle bin" of a program, the e-mail is still being "maintained" by the county for purposes of the Act and is still considered "public information." However, to the extent an e-mail has been deleted from the trash bin, and thus the location of the file on the hard drive has been deleted from the FAT, we believe the e-mail is no longer being "maintained" by the county and therefore the e-mail is no longer public information. *Id.* § 552.002(a).

The county's officer for public information carries the duty of promptly producing such public information when it is requested, unless the county wishes to withhold the information. *Id.* §§ 552.203, .221. If the county wishes to withhold the information, it must request a decision from the attorney general and submit to the attorney general, among other things, a copy or representative sample of the public information being requested. *Id.* § 552.301. Therefore, to the extent the deleted e-mails responsive to the instant request are still contained in a trash bin of a county computer program, the county is obliged to retrieve those e-mails and promptly make them available to the requestor or submit them to the Attorney General for a decision.[1] Because you did not submit any such e-mails to this office for our decision, they are presumed to be public. *Id.* §§ 552.301(e), .302. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd.*

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[1]You indicate that if the county were able to retrieve deleted e-mails, it would require the use of technology. We note that section 552.231 of the Government Code establishes the procedure for responding to a request for information that requires programming or manipulation of data.

of Ins., 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because you have neither asserted any exceptions to withhold any deleted e-mails nor provided any e-mails responsive to the request to this office for review, we have no ground for determining that a compelling reason exists for withholding any of the information in any such e-mails. Accordingly, if an e-mail responsive to the instant request is contained in a trash bin on a county computer, the county must release the e-mail. We caution that the distribution of confidential information constitutes a criminal offense. Gov't Code § 552.352. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

Next, we address your argument under section 552.108 of the Government Code for the information you submitted. Section 552.108(a)(2) excepts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. A governmental body claiming section 552.108(a)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. You indicate that the information in Exhibit E, consisting of the notes of the county district attorney and an interview by the district attorney's chief investigator, relates to a 1996 investigation in which charges were never filed. Thus, you contend that the submitted information relates to an investigation that has concluded in a result other than a conviction or deferred adjudication. Based on your arguments and our review of the information, we agree that the county may withhold Exhibit E under section 552.108(a)(2).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested

information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Nathan E. Bowden

Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 147480

Encl. Submitted documents

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